In the

United States Court of Appeals

For the Ninth Circuit

No. 13010

POTLATCH OIL & REFINING COMPANY, a Corporation, and JEAN P. GERLOUGH, STANLEY H. HODGMAN and ROY E. LARSON, as Trustees of That Certain Trust Known as Inland Empire Oil and Gas Syndicate, a Common Law Trust,

Appellants,

vs.

THE OHIO OIL COMPANY, a Corporation,

Appellee.

BRIEF OF APPELLEE.

Louis P. Donovan,
Shelby, Montana,
W. H. Everett,
Casper, Wyoming,
Attorneys for Appellee.

THE GUNTHORP-WARREN PRINTING COMPANY, 510 WEST JACKSON, CHICAGO

SUBJECT INDEX.

Table of Cases.

Revised Codes of Montana, 1947.

Statutes:

Texts.

No. 13010.

In the

United States Court of Appeals

For the Ninth Circuit

POTLATCH OIL & REFINING COMPANY, a Corporation, and JEAN P. GERLOUGH, STANLEY H. HODGMAN and ROY E. LARSON, as Trustees of That Certain Trust Known as Inland Empire Oil and Gas Syndicate, a Common Law Trust,

Appellants,

vs.

THE OHIO OIL COMPANY, a Corporation,

Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The following statement of the case differs in some respects from that set forth in appellants' brief. Because it is believed these differences will become at once apparent to the court, no particular references to or emphasis upon controverted facts will be made herein. There is no dispute as to jurisdictional facts. This is a civil action between citizens of different states, and the matter in controversy exceeds the sum of $3,000 exclusive of interest and costs.

This action was filed on March 18, 1947, for an accounting and to recover money allegedly due appellants as a result of operation by appellee of oil and gas leases owned jointly by appellants and appellee.

A written agreement dated June 15, 1922, governing said operation was entered into by and between Troy-Sweet Grass Oil Syndicate, a common law trust, hereinafter called "Troy," as First Party, and The Ohio Oil Company, a corporation, hereinafter called "Ohio," as Second Party. On the same date Troy assigned to Ohio an undivided 55% interest in and to the oil and gas leases described in said agreement. Ohio agreed to drill a free well, and on July 5, 1922, entered into possession of the leased lands and completed a commercial gas well thereon on September 18, 1922, and a commercial oil well on January 27, 1923. The pertinent provisions of the agreement (which appellants have unsuccessfully sought to vary and contradict by parol testimony) are as follows:

> "III. *In the event that the well described in paragraph two herein above shall prove a commercial well, the party of the second part shall continue the work of developing and operating said premises in as diligent a manner as field and market conditions warrant and as is consistent with good business management. It will pay all costs and expenses of developing and operating said lands for oil and gas purposes, as herein provided, and shall charge the sāid party of the first part Forty-five (45%) per cent thereof.* Second party shall market all oil and gas produced upon said land and account to the party of the first part for the undivided Forty-five (45%) per centum of the proceeds thereof at the prevailing market price at the wells for said oil and gas after deducting all royalty oil and gas or the proceeds thereof. The said party of the second part shall be reimbursed by the said party of the first part solely from the first party's proportion of the oil and gas produced and sold from said land. Application from

proceeds from sale of said oil and gas will be made to the credit of the first party's account upon the first day of the month following that in which said oil and gas is sold, but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands. The party of the second part shall be entitled to and shall charge the party of the first part eight (8) per centum interest upon all moneys so advanced for the development and operations upon said lands for the account of the interest of the first party's until the same shall have been paid out of the proceeds of the party of first part's proportion of the oil and gas produced and sold as herein provided, said interest payments to be also paid out of production.

"IV. The *party of the second part hereby agrees to render the party of the first part monthly statements* showing the actual cost and expenses of developing and operating said lands and leases *and will remit monthly to the party of the first part all proceeds of the oil and gas sold from the interest of the first party over and above the amount necessary to reimburse the party of the second part for expenditures made by it* for the account and interest of the party of the first part.

"V. The party of the first part through its duly authorized agents or representatives shall at all reasonable times have access to the buildings, lands and property hereinabove for the purpose of examining the operations thereon and the production therefrom, and at all reasonable times during business hours shall have the right to examine the books and records of the party of the second part insofar as they pertain to the operations conducted under this agreement.

"* * *

"The terms and conditions of this agreement shall extend to and be binding upon the heirs, administrators, successors and assigns of the parties hereto." (R. 19, 20, 21) (Emphasis above and elsewhere in this brief added unless otherwise indicated.)

On January 1, 1923, Troy assigned a 22½% interest in the "Baker Lease" to appellant, Inland Empire Oil and Gas Syndicate, hereinafter called "Inland." On August 18, 1923, Troy assigned to appellant, Potlatch Oil and Refining Company, hereinafter called "Potlatch," Troy's remaining 22½% interest in the "Baker Lease," together with all of Troy's interests in all of the other leases described in said agreement. The monthly statements showing the actual costs and expenses of developing and operating said lands and leases were made by Ohio to Troy commencing in August, 1922, and thereafter until Troy assigned to Inland and Potlatch, respectively. After Inland and Potlatch acquired their interests, such monthly statements were respectively made to them. For those months in which the income from the lands and leases exceeded all costs and expenses of developing and operating said lands, the statements were accompanied by Ohio's check under transmittal vouchers which had printed thereon "For payment of following items." Each voucher recited the date and number of the statement, the amount of the remittance, and that the check was either (1) "In full settlement for the amount due you for the net earnings of your part interest holdings as per our Bill No. ...., dated ....," or (2) "In payment of our Bill No. ...., dated ...." (R. 213)

All of the checks and vouchers were currently received by appellants, the checks cashed and the moneys retained. Periodically through the years appellants were requested to examine carefully the statements and to report any differences to Ernst & Ernst, auditors making an examination of Ohio's statements, specifically stating that "If no differences are reported to our auditors, this statement will be considered correct."

No written objections or complaints of any character are

to be found in the files of Ohio from Troy as to any of the charges made under said agreement. Troy was dissolved on July 18, 1925. (R. 387)

On September 11, 1923, Inland complained to Ohio that "overhead expenses" and other charges were improperly included in the monthly statements. By letter of September 22, 1923, Ohio flatly rejected Inland's claims. (R. 309)

On July 17, 1925, appellants' attorneys wrote Ohio objecting to the nature of the charges made, requesting corrections and proposing a conference between Inland, Potlatch and Ohio for the purpose of discussing the items with reference to which there was a difference of opinion. (R. 336)

On July 21, 1925, Ohio's general counsel responded to appellants' attorneys in part as follows:

> "While we feel that the charges were carefully prepared and are entirely justified, representatives of the company will be glad to meet you and discuss with you fully and frankly any items your companies are complaining of. To that end, I am sending a copy of this letter to Mr. F. B. Firmin, the Cashier of the company at Casper, Wyoming, who is familiar with the entire matter, and I am suggesting that he arrange a conference with you at such time and place as may be found mutually agreeable." (R. 339)

On August 7, 1925, the conference was held at Shelby, Montana, and appellants' attorneys agreed to set forth in writing the specific objections and protests made by Inland and Potlatch.

On August 8, 1925, appellants' attorneys wrote Ohio as agreed. (R. 65) The same objections and protests set forth then now form the basis for this action filed nearly twenty-two years later.

On September 12, 1925, Ohio responded to said written objections, clearly and unequivocally refusing to make any changes in the charges, setting forth full explanations and reasons for the refusal, and stating in part as follows:

* * *

> "Under your fifth contention, you further specify that it was discussed between your clients and representatives of this company, prior to the signing of the agreement, that the Troy Sweet Grass Oil Syndicate should only be charged with the actual expense incurred within the four corners of the lease.
>
> "We contend that all charges that have been made are in fact for the actual benefit of this lease and that it is physically impossible to endeavor to draw and establish a mental or imaginary line around the four corners of the lease in order to determine the amount of money that shall be charged for the development and operation thereon. The real fact in the case is that the joint interest owners shall be responsible for 45% and 55% respectively of all charges incurred in the development and operation of said lands. It cannot make any real difference whether certain work is performed off the lands or not, provided said work actually and in fact does benefit said lands. It would be impossible to do and perform each and every act required in the development of oil and gas on this lease, within the four corners thereof. Take the water line for example. One might easily find that he had no water supply within the four corners of the lease and yet it is impossible to operate a lease without water and consequently the operator would be required to haul water from other lands by the use of a tank wagon or other facility or by use of a pipe line from other premises, and, if your contention in this case is correct, The Ohio Oil Company would not be permitted to charge you for any expense incident to the pipe line after it left the boundary line of your lease, although you can easily see that it is imperative that some means be used to convey water from other land to the leased premises. Again, drilling equipment

might need repairing, for example and according to your contention, it would be necessary for The Ohio Oil Company to perform that work upon the lease or else not charge you for it. *The representatives of The Ohio Oil Company who made this contract with your clients do not recall any conversation relative to making charges against the Troy-Sweet Grass Oil Syndicate for the actual amount of expenses incurred on the lease itself or as you say within the four corners thereof.* The quotation that you make is not applicable to the question here involved, for the reason that that is a clause stating that The Ohio Oil Company shall look to the proceeds belonging to the Troy-Sweet Grass Oil Syndicate, in order to reimburse itself for the cost of developing and operating said lands, and that if said proceeds were insufficient to fully reimburse it, that it would be then required to stand the deficiency itself. In other words, this was and is a contract wherein The Ohio Oil Company was obligated to take all the chance incident to the development and operation of the leased lands and should look solely to productions and equipment for reimbursement. We believe that the contract is a fair one and that what the Troy-Sweet Grass Oil Syndicate desired at the time the agreement was made was the development and operation of said land for oil and gas purposes. *They did not discuss with us nor did they express themselves in the light that the only expense chargeable to them would be the expense incurred within the four corners of the lease.* We contend that we have at all times developed and operated this land in an economical and business-like manner, having due regard to all the existing circumstances.'' (R. 73-89 incl.; and 98, 99)

Ohio's representatives referred to in the above letter were Mr. F. E. Hurley and Mr. A. M. Sellery, both of whom are dead. Mr. Hurley died 18 years prior to the commencement of this action, and Mr. Sellery died more than 20 years prior to the commencement of this action.

Mr. F. B. Firmin, referred to above and who rejected appellants' contentions in 1925 on behalf of Ohio, died about five years before commencement of this action. Mr. John McFadyen, Division Manager of the Rocky Mountain Division of Ohio, died more than three years prior to commencement of this action. (R. 154)

On May 20 and June 9, 1936, appellants wrote to Ohio objecting to charges made for auto and trucking expenses. On July 1, 1936, Ohio acknowledged those objections and again refused to make any change in the charges. (R. 352)

Again nothing was heard from nor was any action taken by appellants until the Spring of 1946 when appellants' present counsel conferred with representatives of Ohio and asked for an accounting based upon the same allegedly "improper" charges which Ohio had refused to recognize in 1923, 1925 and 1936. Again Ohio refused to make any change in the charges for the same reasons assigned in those prior years and for the additional reasons set forth in Ohio's Answer herein.

Nothing further was heard from nor was any action taken by appellants until this suit was filed on March 18, 1947.

ARGUMENT.

NO TESTIMONY IS ADMISSIBLE IN THIS CASE TO EXPLAIN, VARY OR INTERPRET THE WRITTEN OPERATING AGREEMENT MADE THE SUBJECT OF THIS SUIT.

Despite appellants' obvious desire to change the provisions of a written contract nearly thirty years later, the operating agreement dated June 15, 1922, is clear and explicit and the law does not permit the introduction of parol evidence to explain, vary or interpret its terms. The trial court had no difficulty whatever in understanding the contract in all its particulars, and in his opinion said:

> "As to the language of the agreement in controversy there seems to be no difficulty in understanding its meaning, and it should be remembered that the parties entering into this agreement were engaged in the production of oil and gas, and familiar with the terms of contracts and leases relating to such industry, and knew or should have known the meaning of the language contained in the agreement to which they affixed their signatures." (R. 146)

The language of that part of the operating agreement alleged by appellants to be the basis for this dispute provides, as heretofore set forth in the Statement of the Case, that in the event of commercial production Ohio was to continue the work of developing and operating the premises in a diligent manner consistent with good business management and was to pay *all costs and expenses* of developing and operating the lands for oil and gas purposes and was to charge Troy for Forty-five (45%) per cent of such costs and expenses. (R. 17)

At the trial, appellants offered in evidence the deposition of T. P. Jones, formerly in command of Troy as its

President and Manager. (R. 178-186, incl.) Most of his testimony, had it been admitted, attempted to vary and, in fact, contradict the plain terms of the written operating agreement of June 15, 1922. However, the trial court had no difficulty in reaching the only proper conclusion when, in his opinion, he said:

> "The testimony of Mr. Jones seems to relate to a different agreement from the one at issue in this case; as it appears to the Court no such interpretation or understanding as he has suggested could be entertained *without writing a new agreement;* such a modification could only have been made by another agreement in writing or by any executed verbal agreement; * * *." (R. 147)

And, further, the Court said:

> "This Court cannot write a new agreement for the plaintiffs 28 years after it was entered into by the parties, when such agreement was stated *in plain terms* and was made, and read, and signed by intelligent and experienced operators in this particular line of industry." (R. 148)

Despite the trial court's finding and conclusions as indicated in his opinion, parts of which are quoted above, appellants would persuade this Court that the sentence in Paragraph III of the operating agreement referred to in connection with costs and expenses does not mean what it so plainly says; that instead of meaning "all costs and expenses of developing and operating said lands for oil and gas purposes * * *" it means something else. Specifically, appellants urge the Court to believe that that language means "costs and expenses of developing and operating said lands for oil and gas purposes, so long as the same do *not* include overhead expenses or other costs and expenses not arising directly out of the drilling and equipping of wells contemplated or within the four corners of the lease."

No doubt the parties *could have* contracted originally so as to arrive at the result appellants now desire. The fact is—*they did not* limit the expenses as now urged by appellants. It is not to be assumed—since it was never alleged or proved—that the parties negotiated at other than arms length. As stated by the Court, each of the parties to this agreement were in the oil business and had been for some time. The terms, generally, of agreements such as this were not in any sense new or novel to any of them. No abstract grammatical or legal principles are needed to convince any reasonable mind that "all costs and expenses of developing and operating said lands for oil and gas purposes, * * *" means just exactly what it says. "*All costs*" does not and never can mean "*less* than all costs."

The portion of Paragraph III of the operating contract quoted above clearly provides that Troy was to bear forty-five per cent of "*all costs and expenses of developing and operating said lands for oil and gas purposes.*" This could only mean that so long as such costs and expenses were for the purpose stated, they were to be paid by Troy proportionately out of production. No other purpose or limitation can be read into the contract. If the parties had originally intended any limitation other than "all costs and expenses," they could have so stated by adding applicable phrases or words.

Appellants contend that the provision in the agreement that Ohio would account to Troy for forty-five per cent of oil or gas produced "at the prevailing market price at the wells" indicates that expenses would be confined to placing the wells in condition to deliver the product at the wells only. That provision states the price to be used in accounting for oil produced and marketed, and fixes that price at the wells. It has nothing to do with the charges for "all costs and expenses" of *developing and operating*

the lands. There can be several different market prices for oil and gas. Here, it *could have been* the prevailing market price in the Salt Creek, Wyoming, field, but it *was* not. The clause in question was purely and simply a description of which market price would prevail in the accounting.

In their brief, counsel for appellants cite various sections of the Revised Code of Montana in connection with the interpretation of contracts. These various sections of Montana statutes become applicable, however, *only if* this operating agreement is ambiguous or uncertain—which the trial court emphatically found it was not. Appellants' counsel, however, make no reference whatever to Section 13-704 R.C.M., 1947, which is as follows:

> "The language of the contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

This section alone disposes of this case.

In addition to the section just quoted above, however, the following sections of the Montana Code, and the decisions with reference thereto, also dispose of the case and clearly indicate that parol evidence, such as was offered in the trial court, is plainly inadmissible for any purpose: Section 13-705, R.C.M., 1947:

> "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this chapter."

Section 13-710, R.C.M., 1947:

> "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

Section 13-907, R.C.M., 1947:

> "A contract in writing may be altered by a contract in writing, or by an executed oral agreement *and not otherwise.*"

In *Bullard* v. *Smith,* 28 Mont. 38, 72 P. 761, 763, a suit on a note, the Court said:

> "It is a well settled rule of law that the circumstances under which a contract is made, or the intent of the parties existing at that time, are only material when the contract is ambiguous in some of its terms. If it is plain and unambiguous it needs no construction, *and it is the duty of the court to enforce the contract* as made by the parties."

The above statement of the rule was quoted with approval in a subsequent decision by the Supreme Court of Montana in *Frank et al.* v. *Butte & Boulder Mining & Lumber Co.,* 48 Mont. 83, 135 P. 904, 906. That case involved a written contract for the repayment by a corporation out of the first earnings of its business, of a loan of $30,000.00 made by plaintiff's deceased. In its decision, and relying upon the Montana Code provisions then in effect, and almost identical to those cited above and presently effective, the Court said:

> "Whatever impulses may control individual action, courts must be governed by law. It is their province to interpret contracts which are open to interpretation, or they may enforce obligations, *but it is beyond their power to make agreements for parties or to alter or amend those which the parties themselves have made.*"

In *Union Central Life Insurance Co.* v. *Jensen,* 74 Mont. 70, 237 P. 518, the Court, in construing the terms of a mortgage defeasance clause, said:

> "Unless contrary to the law or against public policy, the terms of the contract are controlling."

And further, after reciting statutes virtually the same as those controlling here:

> "We are required to give effect to every part of the contract so as to make its terms operative and are not permitted to make a new contract for the parties, nor to read language into it nor eliminate therefrom any of the lawful terms made by the parties themselves, unless the words employed are meaningless or involve an absurdity."

To the same effect are *Emerson Brantingham I. Co.* v. *Haugstead,* 65 Mont. 297, 211 P. 305; *Hinerman* v. *Baldwin, et al.* 67 Mont. 417, 215 P. 1103; *Lisoski* v. *Anderson,* 112 Mont. 112, 112 P. 2d 1055.

In interpreting a written contract, the intention of the parties must be ascertained from the writing alone, if possible, and resort to extrinsic evidence in aid of interpretation may be had only when the contract appears on its face to be ambiguous or uncertain. *Armington* v. *Steele,* 27 Mont. 13, 69 P. 115; *Rowe, et al.* v. *Emerson-Brantingham I. Co.,* 61 Mont. 73, 201 P. 316; *Wheeler* v. *James,* 70 Mont. 37, 223 P. 900; *Hill Cattle Corp.* v. *Killorn, et al.,* 79 Mont. 327, 256 P. 497.

In the *Armington* case, *supra,* involving the exclusion of all testimony altering the plain terms of the tenure under a lease, the court, after confirming the rule which permits evidence of an independent oral agreement *not inconsistent* with the stipulations of the written contract, said:

> "This principle, however, does not apply to a case in which the oral promise relates directly to the subject of the contract, even though the claim be that the complaining parties signed the instrument in reliance upon such promise."

The court then held the evidence to have been properly excluded and quoted a previous Montana decision (*Sanford*

v. *Gates Townsend & Co.,* 21 Mont. 277, 53 P. 749) as follows:

> "Where there is no fraud or mistake in the preparation of the instrument, and it appears that the parties signing understood its language and purport, it cannot be reformed on the ground that he signed upon the faith of a contemporaneous oral promise which was not kept, nor may such promise be received in evidence to control the written contract."

There can be no question in this case that the costs and expenses of developing and operating this land for oil and gas purposes were "related directly to the subject of the contract," within the rule of the above decision. The appellants' contentions and the proffered testimony of T. P. Jones are clearly inconsistent with the stipulations and essence of the written operating agreement, and consequently the law does not permit evidence of such alleged independent oral agreements or promises—which in fact were never made in the first place.

The above rules have often been stated and applied by the courts in many other cases involving the admissibility of parol evidence to vary a written instrument. Unless the particular case decided has come within one of the exceptions to the above rules or presents a question in which the written instrument involved was clearly ambiguous and confusing, the courts have without exception excluded such proffered testimony.

Arnold v. *Fraser,* 43 Mont. 540, 117 P. 1064; *Pitcairn* v. *Phillip Hiss Company,* 125 F. 110; *Crawford* v. *Pierce,* 56 Mont. 371, 185 P. 315; *Webber* v. *Killorn,* 66 Mont. 130, 212 P. 852; *New Home Sewing Machine Company* v. *Sanger, et al.,* 91 Mont. 127, 7 P. 2d 238; *Continental Oil Company* v. *Bell, et al.,* 94 Mont. 123, 21 P. 2d 65; *Ikovitch* v. *Silver Bow Motor Car Company,* 117 Mont. 268, 157 P. 2d 785.

In the case of *Bauer* v. *Monroe, et al.,* 117 Mont 306, 158 P. 2d 485, involving the application of Sec. 13-907 R.C.M. 1947, providing that a contract in writing may only be altered by another contract in writing or by an executed oral agreement, the court said:

> "The rule so set forth in the statute is not a rule of evidence *but it is a rule of substantive law.*"

and further:

> "The rule rests on the doctrine that when parties have deliberately put their agreements in the form of a written contract they shall not be allowed to show that the agreement was something else. *Even though testimony in violation of Section 7569 be admitted at the trial without objection, such testimony has no legal effect and it cannot be considered by the court, trial or appellate.*"

In their brief, counsel for appellants cite the case of *Brown* v. *Homestake Exploration Corporation, et al.,* 98 Mont. 305, 39 P. 2d 168, in which a majority of the court permitted the admission of parol evidence to show and explain the meaning of a clause in an oil development operating agreement which required the defendant-operator to drill wells "to such number and extent as the premises will admit of." The propriety of that decision is not free from doubt—as evidenced by a strong dissenting opinion. The *Brown* case is clearly distinguishable from the case at bar *because of the difference in contract provisions.* The contract in the *Brown* case provided for the drilling of wells "to such number and extent as the premises will admit of," and is not entirely free from ambiguity. That phrase immediately raises the question "How many wells were required to be drilled on the lands?" As a consequence, the clause was held to be open to oral testimony.

There can be no question under the agreement in suit as

to what expenses are to be charged to Troy. That matter is resolved by the express terms of the agreement itself which provided that Ohio should charge to the parties, in proportion to their respective interests, "all costs and expenses of developing and operating said lands for oil and gas purposes."

Counsel for appellants also rely upon the case of *Van DePutte, et al.* v. *Texas Pacific Coal & Oil Co.,* 35 F. Supp. 794, decided by this same trial court and arising out of the same operating agreement as that presented for decision in the *Brown* case, *supra.* In the *Van DePutte* case, the controversy arose over the effect of the "expense" clause in the operating agreement there involved. Hon. Charles N. Pray, Trial Judge, does not, however, consider that case to be in point with this suit, and his present opinion, now under appeal, distinguishing the two cases is as follows:

> "The phraseology of the Van DePutte agreement was much different from this case; in that case the plaintiffs, lessors, were repeatedly assured over a long period of time by the defendant, lessee, that they would get together and consider the charges, and that all proper adjustments would be made, but the lessee never kept its agreement to make good these assurances, and finally the plaintiffs brought suit, and the parties stipulated that defendant would submit an account of all charges made under the agreement for determination by the Court; this was done and the Court eliminated all charges deemed to be improper under the agreement; the defense of laches and limitation of actions was pleaded by defendant, but was denied by the Court. If any laches existed in that case, the Court held that both sides were equally blameable." (R. 147)

Obviously the *Van DePutte* case is not in parallel with this case, being clearly distinguishable on the facts. As

found by the trial court, the phraseology of the two agreements is "much different."

To summarize these two cases, the language in the operating agreement of the *Van DePutte* case that "expense of drilling * * * shall be defined to mean * * * actual cost and expense of drilling, equipping and placing all wells in a state of production * * *" is a limitation and something considerably less than "all costs and expenses of developing and operating * * *" the lands in the instant case.

Appellants contend that overhead and district charges are not included within the provisions of the operating agreement, which provides that they should be charged with their proportionate share of "all costs and expenses of developing and operating said lands for oil and gas purposes," and that appellee's accounts improperly included such items therein.

Regardless of their contentions, an overhead charge is just as legitimate as any other actual charge that should be made against this lease. *Bonbright, et al.* v. *Geary, et al.,* 210 F. 44; *Ft. Dearborn Trust and Savings Bank* v. *Skelly Oil Company,* 146 Okla. 179, 293 P. 557; *U. S.* v. *Standard Oil Co. of California, et al,* 21 F. Supp. 645.

In the *U. S.* v. *Standard Oil Co. of California* case, *supra,* (p. 656), the court in allowing "overhead expenses" said:

> "In the case of a corporation operating on a large scale, it is considered legitimate accounting practice to allocate general overhead expenses to particular operations upon a percentage basis. *In our era of highly developed industrial organizations, management is a legitimate part of operations.* See *Lytle, Campbell & Co.* v. *Somers, Fitler & Todd Co.,* 1923, 276 Pa. 409, 413, 120 A, 409, 27 A.L.R. 41; 46 C.J. 1162. It is so considered in computing costs. See *Ft. Dearborn Trust & Savings Bank* v. *Skelly Oil Co.,* 1930, 146 Okl. 179, 293 P. 557; *New Domain Oil & Gas Co.* v. *McKinney,* 1920, 188 Ky. 183, 221, S.W. 245."

The wells on the leases included in the operating agreement were operated by Ohio within a district in which other wells and properties were being operated. Therefore, the case of *Luling Oil and Gas Co.* v. *Humble Oil and Refining Company* (Supreme Court of Texas), 144 Tex. 445, 191 S.W. 2d 716, 725, clearly sustains appellee's position here with respect to overhead and district expense items appearing in the monthly statements furnished appellants. Referring to district expense, the court in that case said:

> "Specifically, Luling asserts that the fixed per well charges provided for in the contract to cover bookkeeping, etc., and 'all other general and division overhead expenses' by necessary implication exclude the charges denominated 'district expenses.' According to the evidence the jointly owned property consisted of 64 wells. It seems that this property was operated by Humble within a district in which many other wells were being operated other than the property jointly owned by the parties. It is in evidence that Humble allocated to the jointly owned property its proportionate part of the district expenses as the number of wells situated on the jointly owned property bore to the number of wells of the entire district. The control of operations being in Humble under the contract, it was obligated to operate the property in good faith. If in the exercise of that right it was deemed necessary to include the property within a district which embraced other oil producing property, Humble had the right to do so, and under the second clause of the contract it had the right to charge all necessary expenses of drilling, etc., as well as expenses of treating, etc., the oil and gas produced on the property to the joint account. Luling has not directed us to any evidence tending to show that any part of the $196,135.85 was not a necessary expense in operating the jointly owned property. Neither have we been directed to any evidence tending to show that any part of said sum was not properly allocated to the jointly owned property."

PLAINTIFFS' ACTION IS BARRED BY STATUTES OF LIMITATION AND LACHES.

The Montana statutes of limitation prescribing the periods for commencement of actions, other than for the recovery of real property, are as follows:

An action upon any contract obligation or liability founded upon an instrument in writing must be filed within eight years (Sec. 93-2603, R.C.M., 1947).

An action upon a contract, account or promise not founded on an instrument in writing must be brought within five years (Sec. 93-2604, R.C.M., 1947).

An action to reform a contract or for relief upon the ground of fraud or mistake must be brought within two years after discovery of the facts alleged to constitute the fraud or mistake (Sec. 93-2607, R.C.M., 1947).

The statutes of Montana are clear that a promise sufficient to toll the statutes of limitation must be in writing signed by the party to be charged thereby. Sec. 93-2716, R.C.M., 1947, provides that:

> "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of Sections 93-2401 to 93-2720, unless the same is contained in some writing, signed by the party to be charged thereby. * * *"

No such written promise is to be found in the record and none was ever made by Ohio.

Appellants failed to commence and prosecute this suit within the period provided by the Montana statutes quoted above, and are now barred thereby under the unquestioned facts of this case. Appellants are also barred and estopped by laches and stale demand.

The subject matter of appellants' alleged cause of action is the cost and expense chargeable under the written oper-

ating agreement of June 15, 1922. The record shows that as early as 1923 appellants challenged the agreement in this respect—but did not sue. Again in 1925, *through their counsel,* they challenged the charges made under the operating agreement in this respect—but did not sue. And finally, in 1936 appellants again challenged the costs and expenses under the operating agreement—but did not sue. The record shows conclusively that at each stage of inquiry and attack Ohio flatly refused to heed or conform to appellants' views, but instead the same were at all times rejected. Appellants' cause of action, if any, therefore arose when the first statements were furnished Troy by Ohio in 1922. No objections were ever made by Troy. If, in September, 1925, appellants did not agree that the operating agreement clearly expressed the intention and agreement between Troy and Ohio, their remedy was one to reform the contract for mistake. Such an action is clearly barred by Sec. 93-2607, Subd. 4, *supra.*

Appellants claim that their failure to file suit is explained by certain alleged verbal conversations in 1926 between Mr. T. P. Jones and Mr. John McFadyen, former Division Manager of Ohio, who died approximately three years prior to the commencement of this action. Attempting to escape the effect of the "Dead Man's Statute," (Section 93-701-3, R.C.M., 1947), appellants offered the deposition of T. P. Jones. It is significant that appellants would now have the Court believe that they place so much reliance on Mr. McFadyen's alleged 1926 statement, yet no reference thereto was ever made by appellants or any of them to Ohio from 1926 until after this suit was filed in 1947. How do they explain that? The Jones testimony is wholly inadmissible and is expressly excluded by said Sec. 93-701-3, R.C.M., 1947, which prohibits parties or assignors of parties to an action or proceeding from testifying as to oral communications between the proposed witness and the deceased

agent of a corporation, except when it appears to the court that without the testimony of the witness injustice will be done. See *Wilcox* v. *Schissler,* 55 Mont. 246, 175 P. 889.

It is not questioned that Mr. McFadyen was an employee and agent of Ohio and that Jones was a trustee and president and general manager of Troy, appellants' predecessor in title.

Appellants in their brief (p. 52) admit that it is discretionary with the court to permit a witness to testify as to oral communications with a deceased representative of a corporation.

The trial court disposed of appellants' contentions with respect to the proffered Jones' testimony as follows:

> "* * * nor could the purported verbal statements of the deceased Ohio representative have been effective to toll the statutes of limitations unless they were submitted in writing. Sec. 93-2716 R.C.M. 1947. From all the evidence and rules that appear applicable it does not seem that this testimony is necessary to prevent an injustice being done in this case." Citing authorities. (R. 148)

The court went on to rule specifically upon the Jones' testimony in the following words:

> "Having considered the arguments in favor of and in opposition to the admission of the testimony of Mr. Jones, and numerous authorities cited by counsel for the respective parties, the Court is now of the opinion that the objection thereto should be sustained and such will be the order of Court herein. Even if this testimony were admitted it could be of little probative value as affecting the bar of the statute of limitations, since a continuous and unvarying course of conduct on the part of the defendant has been established by convincing proof over a period of about 25 years during which defendant refused to make any such changes in its charges as were requested by plaintiffs or their representatives." (R. 148)

And in finally disposing of all of appellants' contentions with respect to the statutes of limitation and laches, the court made this succinct statement:

> "It appears that plaintiffs finally brought suit in 1947, after all but one of the representatives of defendant who had participated in the making of or execution of the agreement, or had any definite knowledge concerning it, had died. In the Court's opinion this is a tardy suit and the laches of plaintiffs and the statutory limitations cited by counsel would bar recovery under plaintiffs' claim. From a perusal of the facts and contentions of counsel the Court is unable to agree that this undertaking constituted a joint adventure and thereby imposed obligations upon defendant as a trustee for plaintiffs." (R. 149)

In support of the trial court's decision, see the following: *Mossback* v. *Smith Bros. Sheep Co.,* 65 Mont. 42, 210 P. 910; *Averill Machinery Co.* v. *Taylor, et al.,* 70 Mont. 70, 223 P. 918; *Langston, et al.* v. *Currie,* 95 Mont. 57, 26 P. 2d 160; *Pincus* v. *Pincus' Estate,* 95 Mont. 375, 26 P. 2d 986; *Phelps* v. *Union Central Life Insurance Co.,* 105 Mont. 195, 71 P. 2d 887; *Rowe* v. *Eggum,* 107 Mont. 378, 87 P. 2d 189; *Marcellus* v. *Wright,* 65 Mont. 580, 212 P. 299; 3 Jones on Evidence, Sec. 789; 19 Am. Jur. p. 355.

In the Montana courts the general rule is that laches is considered to be a bar independent of the statute of limitations, and under the facts of this case appellants were certainly guilty of laches in asserting their cause of action if any they had. In *Riley* v. *Blacker,* 51 Mont. 364, 152 P. 758, the court said:

> "Laches, considered as a bar independent of the statute of limitations, is a concept of equity; it means negligence in the assertion of a right; it is the practical application of the maxim, 'Equity aids only the vigilant,' and it exists when there has been unexplained delay of such duration or character as to render the enforcement of the asserted right inequitable."

Appellants contend that the operating agreement created a joint venture between the parties out of which grew a trust relationship between them. That such contention is without merit is clearly demonstrated in the case of *Luling Oil & Gas Co.* v. *Humble Oil & Refining Co.,* 144 Tex. 445, 191 S. W. 2d 716, which will be discussed in detail in the next section of this brief with respect to the matter of account stated. Appellants, basing their argument on this erroneous premise, hoped to excuse their negligence or lack of vigilance in bringing their suit within the statutory periods of limitation and to excuse their laches. Ohio is not a trustee for appellants, and the fact that appellants are dissatisfied, because the trial court excluded the Jones' testimony and refused to rewrite the contract for them, does not change the relationship of the parties so as to excuse appellants' failure to act promptly if they actually believed they had a meritorious case.

Appellants are in very poor position to complain of the action of the trial court in rejecting the proffered testimony of T. P. Jones. They state in their brief (pages 52 and 53) that the decisions of the Supreme Court of Montana, construing Sec. 93-701 R.C.M. 1947, "* * * have consistently held *it is discretionary with the court* to permit a witness to testify as to oral communications with the deceased person, deceased representative of a corporation." They have not contended or endeavored to show any abuse of discretion whatsoever on the part of the trial court and are apparently unmindful of the rule governing matters of this character as stated in 5 C.J.S. 500, Sec. 1604:

> "Rulings of the trial court with respect to the reception or rejection of evidence, as to which it is vested with a sound discretion, will be reviewed only where such discretion has been plainly abused."

The burden of showing an abuse of discretion rests on the appellant. (3 Am. Jur. 525, Sec. 960)

At the bottom of page 63 of appellants' brief, counsel states:

> "Under the laws of Montana and other jurisdictions neither the defense of the statute of limitations nor of laches is available to a joint adventurer or a trustee in an action brought by a joint adventurer or beneficiary for an accounting until after termination of the joint venture or the trust or the repudiation of the trust by the trustees."

citing at page 64, four cases in support of the text above quoted.

Even a casual reading of those cases does not in any way support appellants' contention. They make it clear that even if it be assumed Ohio was a trustee in some respects for appellants, that trust, insofar as the same pertains to the matter of costs and expenses charged under the operating agreement herein, was openly, clearly and unequivocally disavowed and repudiated upon every occasion when appellants' contentions were brought to Ohio's attention, and specifically in writing in 1923, 1925 and 1936. For example, in the case of *State* v. *Rorabeck,* 111 Mont. 320, 108 P. 2d 601, 604, cited by appellants, the court, after reciting the general rule, states:

> "The true rule with respect to the statute of limitations and express trusts is more clearly stated as follows: During performance of the express trust there is no cause of action for breach and so the statute of limitations has no bearing on the rights of the cestui; but, if the trustee violates the trust and the cestui knows of such conduct, or could have learned of it by the use of reasonable diligence, the court will apply the statute of limitations which governs equitable causes of action or an analogous statute concerning legal causes of action. To cause the statute to begin running during the life of the trust there must be some act of repudiation of the trust by the trustee, as where he

declines to account to the cestui, takes trust income for his own purposes, or sets himself up as the owner of the trust capital.''

Appellants claim that there was no repudiation of appellants' contentions prior to 1943 and that the sale at that time to The Texas Company constituted such a repudiation of the claimed trust, and as a consequence the statutes of limitation do not commence to run until that date.

Appellants must have overlooked the 1923, 1925 and 1936 repudiations of their present contentions.

Appellants' claim that the sale by Ohio constituted a repudiation of the alleged ''trust'' is ridiculous, because the 1922 agreement contemplates an assignment or sale by either party and is binding upon successors and assigns. For emphasis we might ask appellants if the sale by Troy to appellants in early 1923 constituted a repudiation of the contract? If so, upon what is their suit now based?

OHIO'S MONTHLY STATEMENTS TO APPELLANTS CONSTITUTE AN ACCOUNT STATED.

Appellants have contended at all times that there is no account stated. The trial judge answered appellants' contention when he found that appellants had accepted Ohio's monthly statements with remittance slips, which clearly indicated that checks were in full settlement or in full payment of the respective items for the respective months; that Ohio paid to appellants, during the period between commencement of production and January 31, 1943, approximately $400,000 over and above appellants' respective shares of all costs and expenses of developing and operating said lands for oil and gas purposes, and that said statements and payments were accepted by appellants during all of said period, well knowing that Ohio had repeatedly refused to make any changes in its charges, such as appel-

lants proposed, and appellants knew or should have known that the payments were made by Ohio in full settlement of the respective items covered in its monthly statements. (R. 149, 153, 154)

The specific conclusion of law declared by the trial court with respect to this proposition is as follows:

> "6. The monthly statements of account furnished by Ohio to Troy, Potlatch and Inland and the acceptance and retention of the moneys paid to them respectively by Ohio with knowledge that Ohio repeatedly refused to make any changes in its accounting and made each payment in full settlement of each statement constitutes an account stated between Ohio and Plaintiffs and may not now be challenged by them." (R. 156)

Five boxes of monthly statements, remittance slips, etc. (plaintiffs' Exhibits A, B, C and D) have been transmitted to this court as a part of the record herein. A careful examination of these exhibits is invited and will show the detail and completeness of each and every account. Each monthly statement, remittance slip or accompanying invoice shows clearly that the payments computed in accordance therewith were made and stated to be either in full settlement of the items therein mentioned or as payment in full.

An account stated is an agreement between the parties based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance, if any, in favor of one or the other. *Thomasma* v. *Carpenter,* 175 Mich. 428, 141 N. W. 559; *Thomas O'Hanlon Co.* v. *Jess,* 58 Mont. 415, 193 P. 65; *Brown* v. *Southern Grocery Co.,* 168 Ark. 547, 271 S. W. 342; 1 Am. Jur. 272, Sec. 16.

The Supreme Court of Montana has recognized the principle of account stated in numerous cases, one of which clearly demonstrates the soundness of Ohio's defense in this case. In the case of *Norum* v. *Ohio Oil Company, et al.,*

83 Mont. 353, 272 P. 534, plaintiff sought to recover from defendant a portion of the license tax which defendant had retained from plaintiff's oil royalties in the belief that defendant owed such tax. One of the defenses was account stated, based upon the showing that the monthly statements rendered to plaintiff showed such deductions. The trial court awarded judgment to plaintiff, and on appeal the Supreme Court, while finding that plaintiff was not bound by law or by the contract to pay the tax, nevertheless reversed the trial court and sustained this defense, stating:

> "He was chargeable with notice of his legal rights under the law and the express terms of the contract. However, the plaintiff regularly received the monthly statements rendered by the defendants, and accepted and received settlements made in accordance therewith without objection during a course of dealing of more than two years, with full knowledge that deductions were regularly made of 2% of the total royalty agreed to be paid in liquidation of his alleged proportion of the tax. It must be held that this constituted an implied account stated by acquiescence, and the plaintiff may not now recover the deductions so made from the royalty to which he was rightfully entitled under the law and the terms of the contract."

The record here will show that some corrections were made in the accounting with respect to errors in the amounts of entries only. It will also show that the objections going to the nature of the charges presented in 1923, 1925, 1936 and 1946 were totally repudiated and rejected by Ohio, and yet appellants continued throughout the period of production to receive the itemized monthly statements and to retain the moneys paid them by Ohio. Not one of appellants' questions ever remained unanswered. Therefore, if any one monthly statement was not an account stated when rendered, because of objection made to it, it became an account stated when the error in the amount of the entry was

corrected or when such objection was repudiated, refused or denied, and appellants thereafter took no further action with regard thereto except to retain the sums paid therewith.

The last exchange of correspondence between appellants and Ohio regarding objections to the nature of charges was in the year 1936. By letter of July 1, 1936, Ohio rejected the claim of appellants and thereafter monthly statements and payments were made to and received by appellants without objection. From 1936 until 1946 no further complaint or objection of any character was made to Ohio by appellants. In 1946 appellants' contentions were again repudiated and emphatically denied.

Appellants cite some cases to the effect that the retention of money or payment under periodic statements does not constitute an account stated so long as proper objections are made. These cases, however, do not stand for the proposition that the retention by appellants may continue beyond a repudiation or rejection by appellee of the appellants' objections and claims. If X renders a monthly statement accompanied by check to Y and Y objects to the statement or amount of the check but cashes it after X has repudiated and denied Y's objection, the account becomes stated. Any other result would be unfair and inequitable and would subject the defendant to the reopening of an old account years after it had been adjusted and closed. The appellant in the meantime would retain the proceeds received, well knowing that the amount paid was in full settlement and that their contentions had been repudiated. None of the cases cited in appellant's brief is in disagreement with this proposition.

In the *Norum* case, *supra,* the Montana Supreme Court cited the case of *Chappedelaine* v. *De Chenaux,* 4 Cranch 306, 2 L. Ed. 629, in which Chief Justice Marshall stated:

> "No practice could be more dangerous than that

> of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony."

The rule of law which will not permit the opening of accounts after retention of funds by a plaintiff who has not objected is well expressed by the Supreme Court of Kansas in the case of *McKnab-Bess Oil Co.* v. *Commonwealth Oil & Gas Co.*, 142 Kan. 739, 52 P. 2d 363. This was an action for accounting between oil companies and the court held that the defendant was not a trustee for plaintiff. The court had before it certain monthly statements submitted by defendant to plaintiff. In deciding against the plaintiff, the Kansas court said:

> "The accounts rendered in the case at bar are analogous to those made by a bank. The contract between the parties required that a statement of account should be made showing all obligations and charges contracted. Each statement contained items which made up the amounts it is claimed were erroneously charged. The plaintiff was charged with a duty to examine the accounts that were rendered each month and call the attention of the defendant to any errors or mistakes occurring in them. The plaintiff argues that some of the charges that were made were based on a wrong construction that was placed on the contracts with reference to the 6 per cent charge. No reason appears, however, why that wrong construction could not have been discovered as readily when the first statement was made as more than two years after the last one. It will be noted that plaintiff pleaded that at all times it assumed and believed that the monthly statements made by defendant were correct. No reason is pleaded or advanced in the argument as to why plaintiff was entitled to make any such assumption any more than any person who receives an account and pays it. Plaintiff argues that the relationship between the parties was a semifiduciary one, but the fact is as appears from the petition every transaction between

> them was evidenced in writing and they dealt with each other at arm's length at all times. Each monthly account was an invitation to the plaintiff to examine it as to its correctness before paying it. When the auditors of plaintiff did examine the accounts the errors were found that are the basis of this action. Had as critical an examination been made when the first accounts were rendered in 1929, plaintiff would not have been confronted with the defense of the statute of limitations. As it is, we hold that the statute started to run when the first alleged erroneous account was rendered and the action is barred by R. S. 60-306, paragraph 3. This conclusion is fortified by *Porter* v. *Price* (C. C. A.), 80 F. 655, also *Knox* v. *Pearson,* 64 Kan. 711, 68 P. 613."

In the instant case, Ohio did not at any time indicate to appellants that any of the claims presented in 1923, 1925, 1936 or 1946 would be recognized or granted, but on the contrary repudiated specifically each and all of such claims, and the vouchers which accompanied the payments recited that the payments represented thereby were in full payment or full settlement of the accompanying monthly statement of account. Appellants thereafter accepted the statements and retained the proceeds with full knowledge of appellee's position in the matter.

In the case of *Luling Oil & Gas Co.* v. *Humble Oil & Refining Co.,* 144 Tex. 445, 191 S. W. 716, the Supreme Court of Texas in its decision of December 29, 1945 (rehearing denied January 30, 1946) disposes of each and all of the contentions made by appellants here with respect to the application of statutes of limitations and stale demands:

> "Suit by Luling Oil & Gas Company against Humble Oil & Refining Company for an accounting and to recover money allegedly due plaintiff as a result of operation by defendant of oil and gas leases owned jointly by plaintiff and defendant. * * *
>
> "Luling Oil & Gas Company entered into a contract

with Humble Oil & Refining Company on the 30th day of July, 1928, wherein Luling obligated itself to sell to Humble an undivided one-half interest in and to certain oil and gas leases covering land situated in Caldwell County, Texas. The consideration for the contract was $100 per acre and the agreement of Humble to drill one well on the premises at its own cost and expense. The contract gave Humble exclusive charge and control of all operations. All expenses of drilling, developing, operating and equipping said property after the completion of said first well, as well as all expenses of treating, handling, and marketing the oil and gas were to be charged to the joint account. Luling was not liable for its one-half of operating expenses, but Luling's part of such expenses was to be borne by and paid out of its one-half interest in production. The contract contains provisions with reference to charges to be made in the operation of the property between the corporations. The Humble, according to the contract, was to keep accurate records of all joint accounts showing the cost and expenses incurred and charges made and all credits made and received. The contract further provides:

" 'Within one month after the close of each calendar month Second Party (Humble) shall furnish to First Party (Luling) a statement of investment and expenses incurred and credits and receipts during such calendar month. Any exceptions to the statement as rendered by Second Party must be made by First Party (Luling) within forty-five days after the receipt of same; and if no exception is made within such time, then such statement shall be conclusively considered as correct. If such statement is incorrect First Party shall be credited for any excess payment made and shall be debited by any excess credit allowed. The provisions of this paragraph, however, shall not prevent annual adjustment of physical property to inventory as above provided.'

"The contract further provides:

" 'All proceeds received from the sale of oil and gas produced and saved from the said premises and

pertaining to the working interest shall be first credited to joint account; and if any excess remains after the payment of all charges to joint account then accrued, Second Party shall pay the First Party its one-half of the sums remaining.' * * *

"The Humble drilled and brought into production some sixty-odd wells, a number of which were in production at the time of the trial of this lawsuit in 1942. This suit was filed on the 13th day of November, 1940, in the district court of Harris County. Luling Oil & Gas Company sought a recovery of a large sum of money from Humble Oil & Refining Company alleged to be due because of the Humble's failure to properly account for oil produced and to properly charge expenses in the production and sale of oil which was found under leases owned by both corporations.

"* * *

"Luling complains of the ruling of the Court of Civil Appeals to the effect that all amounts sued for which became due more than four years prior to the filing of this suit are barred by the four year statute of limitation. Its contentions are urged through four points of error, viz.:

"1. That the contract under which the rights of the litigants arose creates a joint adventure or mining partnership, therefore Section 3 of Article 5527, Revise Civil Statutes of Texas 1925, is applicable. Hence limitation does not commence to run against a cause of action for a general accounting until cessation of the business of the mining partnership. * * *

"4. The claims were not barred by the four year statute of limitation for the reason that the exclusive control of operations and bookkeeping assumed under the contract by the Humble constituted it a trustee for the Luling, and there being no repudiation of the trust the bar of the statute cannot be invoked.

"5. Under the evidence the Humble as trustee of an express trust refused to disclose secret profits to Luling until after this suit was filed, hence Humble cannot invoke the four year statute of limitation.

"Humble contends that Section 3 of Article 5527 has no application to the facts of this case, but rather that the cause of action asserted by Luling is founded upon a contract in writing, therefore the four year statute is applicable.

"Whether the relationship of joint adventure or mining partnership existed between Luling and Humble under the contract does not seem to us to be the controlling issue, since the rights of the parties are fixed by the terms of their agreement. Under our view of the case the real and determinative question is, does the four year statute apply as contended by Humble, or does Section 3 of Article 5527 apply as contended by Luling? Article 5527 in part reads:

" 'There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

" 'Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing. * * *

" 'Actions by one partner against his copartner for a settlement of the partnership accounts, or upon mutual and current accounts concerning the trade of merchandise between merchant and merchant, their factors or agents; and the cause of action shall be considered as having accrued on a cessation of the dealings in which they were interested together.'

"The parties to this action stipulated that the contract is now a valid and subsisting agreement under which the oil and gas leases are being operated. They stand on the rights granted to them under it. Neither company seeks to set the contract aside. The contract required Humble within one month after the close of each calendar month to furnish Luling with a statement of investment and expenses incurred and credits and receipts during such calendar month. *Thus a settlement of accounts between the parties within one month after the close of each calendar month was clearly intended by the use of the quoted language. This provision clearly fixed the time of adjusting the*

accounts made necessary in the operation of the jointly owned leases and the time when the Humble was to pay whatever was due Luling, if any there was, over and above the necessary operating charges against the leases. Under this provision it was the duty of Humble within the time specified to furnish Luling with a correct statement of accounts, both credits and debits, necessarily made in the operation of the property. More specifically, the proceeds received from the sale of oil and gas were first to be credited to the joint account, and if any excess remained after the payment of all charges to the joint account than accrued Humble shall pay Luling its one-half of the sums remaining. *Regardless of whether the relationship of joint adventure or mining partnership existed between the parties, the provisions of the contract clearly fix the time of adjusting the accounts and the time when whatever was due Luling was to be paid under it.* Luling has stipulated that the oil and gas leases jointly owned by it and the Humble were at the time of the trial of this cause being operated under the contract. It is seen that no cessation of the dealings in which Humble and Luling are interested together has occurred. It is not contended that Humble and Luling are partners in the common and ordinary sense of the term; neither is it contended that the parties to this suit have engaged in the trade of merchandise between merchant and merchant, etc. Luling does vigorously contend that under the contract the relationship of joint adventure or mining partnership was created, and in such a case Section 3 of Article 5527 is applicable.

"The statute sought to be invoked is by its own terms limited to the class or classes mentioned therein, that is, one partner against his copartner, and then only for settlement of the partnership accounts, mutual and current accounts concerning the trade of merchandise between merchant and merchant, etc. *It was not intended to apply to a case like the present where joint owners of an oil and gas lease operate the same under a contract whereby accounts of the cost of*

operation are kept upon a monthly basis and the revenue received from the operation is to be paid to the joint owners each month. The parties, as shown by the contract, never intended that a cause of action for whatever was due Luling each month would not accrue until cessation of dealings. The contract made between the corporations specifically provides otherwise. Moreover, in this action Luling claims amounts alleged to be due each month from 1929 through 1940. It claims interest on said amounts. It seems inconsistent at least to say that such sums were then due and payable, yet for the purpose of limitation a cause of action for said sums should be considered as having accrued on a cessation of the dealings in which the parties are interested together. Thus, there being no cessation of the operation of the jointly owned leases, the cause of action has not yet accrued.

"Courts should apply this exception to a limitation statute when required to do so by legislative mandate, but will only apply it to the class or classes of persons clearly coming within its terms, and only in causes of actions named in the statute. The parties to this action not being within the class of persons named in Section 3 of Article 5527, certainly the statute has no application to this suit.

"Luling relies upon the authority of *Cockburn* v. *Irvin,* Tex. Civ. App., 88 S. W. 2d 747, in which case this court refused a writ of error with the notation 'dismissed for want of jurisdiction.' The case cannot be considered as authority for the propositions now pressed upon the court. In that case a partnership was alleged and proven. Cockburn urged the two year statute of limitation. The court held that when a joint adventure or mining partnership was proven and there being no termination of the venture by Cockburn, the joint adventure or mining partnership continued until the suit was filed. In other words, Irvin's cause of action did not accrue until Cockburn had repudiated his agreement to pay Irvin his one-half of the profits. *In the present case, as we have seen, Humble obligated itself to account for and pay*

whatever was due Luling 'within one month after the close of each calendar month.' Under such an agreement the right to sue came into existence immediately upon Humble's breach of its contract.

"The accrual of a cause of action means the right to institute and maintain a suit, and whenever one person may sue another a cause of action has accrued. *Port Arthur Rice Milling Co.* v. *Beaumont Rice Mills et al.*, 105 Tex. 514, 143 S. W. 926. *Under the contract in suit Luling had the right to examine at any reasonable time all records of the joint account which was to be accurately kept by Humble, including the right to inspect the wells and the production records and reports.* It cannot be doubted that upon Humble's failure to allow an inspection of its records or of the wells at any reasonable time Luling had the right to compel Humble to do so. *Moreover, upon Humble's failure to pay whatever sum was due under the contract within the time specified, Luling had the right to compel Humble to pay through a suit in court.* These elementary principles make it clear, we think, that *while Luling has designated its suit as one for a general accounting, it is not such a suit* as would come within the purview of Section 3 of Article 5527, *but rather comes under one founded upon a contract in writing. In this situation the statute of limitation begins to run at the time when a suit could be commenced upon the claim asserted. Port Arthur Rice Milling Company* case, *supra.* * * *

"The relationship of partners, joint adventure or mining partners being contractual in its nature, whether such a relationship exists generally depends upon the intention of the parties. Where the controversy is between the parties and the parties are corporations, a court would not declare that a partnership existed unless that intention clearly appeared, even though the purposes for which the contract was made were fully within the purposes for which the corporations are chartered. We are of the opinion that the contract in suit negatives the existence of an intention to create a partnership relation between

Humble and Luling. The contract did not authorize either party to create any liability to third parties which would have been binding on the other. A performance under the contract would not necessarily result in the creation of such a liability. The leased premises were to be operated by Humble exclusively. Luling was not obligated for any of the expense. It had no right to participate until the necessary expense was paid and then was to receive its undivided one-half remaining. *Joint owners of an oil and gas lease may, without forming a partnership, contract for the operation of the leases by one of them and for the operator in the event of success pay to the other joint owner one-half of the proceeds of the sale of the oil and gas less the expense of finding it, without creating a joint adventure or a mining partnership. Transcontinental Oil Co.* v. *Mid-Kansas Oil Co.,* 5 Cir., 29 F. 2d 323.

"Luling insists, as above stated, that Humble, in the operation of the oil and gas leases, assumed the relationship of trustee for Luling, and under well settled principles, there being no repudiation of the trust, and the trust not having been terminated, limitation does not commerce to run against the petitioner's suit for net profits not heretofore accounted for and paid.

"The contract, as we have stated, fixed the rights and obligations of the parties. The Humble was obligated to keep an accurate account of the joint investment, both debits and credits, and of all income from the sale of oil and gas. It was obligated to give Luling a detailed report of the account within one month after the close of each calendar month. According to the evidence the Humble made these reports of Luling each month. A dispute arose over the accuracy of the statements as early as 1933. Under the contract Luling had the right to inspect the books concerning these accounts at any reasonable time. While Humble was required to keep an accurate record of the joint account and furnish Luling with a statement thereof each month, the contract further

provided that Luling should make its exceptions thereto within a specified time. It was contemplated by the parties that any differences arising between them should be adjusted promptly or at least within a reasonable time. No good reason is suggested why the parties should not be permitted to so bind themselves. *The relationship between Humble and Luling under the contract in suit is not one of trustee and cestui que trust as that relationship is generally understood.* The corporations bound themselves as to the operation of their jointly owned oil and gas leases. *A breach of the agreement by either corporation is a simple breach of a written contract and the law governing the rights incident thereto is controlled by the law of contracts. Many of the claims asserted in this action grow out of an interpretation of the contract between the parties to it. Luling contends for one interpretation and Humble opposes. Under the evidence the opposing views arose between them as early as 1933, and same were denied by Humble in the early part of 1934. No reason is perceived why under the contract Luling could not have been advised fully and urged its contention in a suit filed at that time. Failing to file suit within four years, it was incumbent upon Luling either to allege a fraudulent concealment or facts which in law would take its cause of action out of the bar of the statute.* We have been cited to no case that presents facts exactly like the facts appearing here, but in our opinion the cases are legion which are analogous to and control the law with reference to the facts in this case. *Powers* v. *Schubert*, Tex. Civ. App., 220 S. W. 120; *Mounger* v. *Daugherty*, Tex. Civ. App., 138 S. W. 1070; *Stephens* v. *Leatherwood*, Tex. Civ. App., 295 S. W. 236; *Hardin* v. *Hardin*, Tex. Civ. App., 1 S. W. 2d 708; *Lewis* v. *Saylors*, Tex. Civ. App., 37 S. W. 2d 760; *Owen* v. *King*, 130 Tex. 614, 111 S. W. 2d 695, 114 A. L. R. 859; Tex. Jur., Vol. 28, p. 295, Sec. 201, p. 297, Sec. 202, p. 299, Sec. 204; *Sidbury* v. *Ware*, 65 Tex. 252; *Texarkana Motor Co.* v. *Brashears*, Tex. Civ. App. 37 S. W. 2d 773; *Jolly* v. *Fidelity Union Trust Co.*, 118 Tex. 58, 10 S. W. 2d 539."

CONCLUSION.

It is anomalous that this suit for equitable accounting is based on inequity; that to entertain the cause the court must disregard equity. It cannot be otherwise, for on June 15, 1922, the "minds" of Troy and Ohio met in perfect agreement, and to permit these appellants, after nearly 25 years, to *contradict* that mutual pledge of obligations so clearly written and so clearly understood is to work an enormous and unjust hardship on this appellee.

Throughout the years appellants could have brought an action at any time if in fact they truly believed they had been wronged. Short of actual discourtesy Ohio could not have made it plainer at each stage of inquiry and demand that it unequivocally refused and rejected all of appellants' contentions. Failing to take any action whatever to test the validity of their claims, the law of reason compels the certain belief that appellants have slept soundly on any claims they may have had.

Moreover, appellants' claimed reliance upon the alleged oral statements of Mr. John McFadyen to T. P. Jones in 1926 (in the presence of no one) emphasizes appellants' sham attempt to persuade this court to disregard all equitable principles as well as fundamental and basic rules of pleading and evidence. If in fact any reliance was placed upon such alleged remarks, supposed to have been made shortly after Ohio had twice in writing refused to recognize any of appellants' claims, why is it that appellants remained silent for more than twenty years thereafter, accepted monthly statements and substantial sums of money in full payment and settlement of their respective accounts, all of which were in accordance with Ohio's written interpretations as set forth in 1923, 1925 and 1936?

To summarize, it is clear that the contract here under attack is so perfectly plain in all its terms that to permit a contradiction of any part of it, by parol testimony or otherwise, would be ridiculous and unlawful; that from 1923 these appellants *knew* that appellee refused their claims regarding the nature and extent of the costs and expenses, and appellants' failure to bring suit until 1947 constitutes the most flagrant laches which, together with the running of the statutes of limitation, bars the assertion of appellants' claims; and, that by appellants' acquiescence in the monthly statements rendered by appellee and the retention of remittances tendered by appellee the said statements became accounts stated, or an accord and satisfaction was reached which now estops appellants from reopening or challenging the statements in any way.

Appellee respectfully submits that the findings of fact, conclusions of law and judgment of the trial court in favor of appellee are more than amply supported by the evidence and law and should be in all things affirmed.

Louis P. Donovan,
Shelby, Montana,

W. H. Everett,
Casper, Wyoming,
Attorneys for Appellee.